(16,667.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1897.

No. 454.

JOHN D. WILCOX, APPELLANT,

*vs.*

THE EASTERN OREGON LAND COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.


| | Original. | Print. |
|---|---|---|
| Stipulation as to printing record in United States circuit court of appeals | 1 | 1 |
| Citation | 3 | 2 |
| Proof of service of citation | 4 | 2 |
| Transcript from circuit court of the United States for the district of Oregon | 5 | 2 |
| Bill of complaint | 5 | 2 |
| Exhibit A—Deed, Dalles Military Road Co. to Edward Martin, May 31, 1876 | 32 | 15 |
| B—Deed, Eleanor Martin, guardian, to Donahue & Phelan, March 21, 1882 | 36 | 17 |
| C—Deed, Donahue *et al.* to Eastern Oregon Land Co., August 11, 1884 | 40 | 19 |
| D—Patent to John D. Wilcox, September 28, 1894 | 50 | 24 |
| Subpœna | 53 | 26 |
| Marshal's return | 55 | 26 |
| Præcipe for appearance for defendant | 56 | 27 |
| Answer | 57 | 27 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 29, 1897.

| | Original. | Print. |
|---|---|---|
| Exhibit A—Letter of Josiah Perham, president N. P. R. R. Co., to J. P. Usher, Secretary of Interior, March 6, 1865 | 64 | 31 |
| C—Letter of J. P. Usher, Secretary of the Interior, to Commissioner of General Land Office, March 9, 1865 | 67 | 31 |
| Map accompanying foregoing letter | 67a | 31 |
| D—Letter of Acting Commissioner of General Land Office to Secretary of Interior, June 22, 1865 | 68 | 32 |
| Order setting cause for hearing | 73 | 34 |
| Order for continuance | 75 | 35 |
| Order taking cause under advisement | 76 | 35 |
| Decree | 77 | 36 |
| Petition for appeal | 78 | 36 |
| Allowance of appeal | 79 | 36 |
| Assignment of errors | 80 | 37 |
| Bond for costs | 85 | 39 |
| Stipulation and order to send up original map | 88 | 41 |
| Clerk's certificate | 89 | 41 |
| Opinion | 91 | 42 |
| Decree | 92 | 42 |
| Petition for appeal and allowance of same | 93 | 43 |
| Bond | 94 | 43 |
| Clerk's certificate | 96 | 44 |
| Citation and acceptance of service | 97 | 44 |
| Stipulation that record in case of Eastern Oregon Land Co. *vs.* Messinger be not printed and case submitted on this record | 100 | 45 |

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY, Complainant,
*vs.*
E. I. MESSINGER, Defendant.

THE EASTERN OREGON LAND COMPANY, Complainant,
*vs.*
JOHN D. WILCOX, Defendant.

*Stipulation as to Printing of Record.*

The bills, answers, decrees, assignments of errors and all
2 the other papers and proceedings in the above-entitled causes being exactly alike, with the exception that in the case of The Eastern Oregon Land Co. *vs.* E. I. Messinger it is alleged that the land patented to the defendant was patented under the provisions of the act of Congress approved May 20th, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto; that the lands patented were the south half of the northwest quarter and lots three and four of section three, township two south of range sixteen east of the Willamette meridian, in Oregon, and were situated within twenty miles of the line of the general route of the Northern Pacific Railroad Company's road, as designated on the map of August 17th, 1870, and that the said patent was dated the 17th day of August, 1894, while in the case of The Eastern Oregon Land Co. *vs.* John D. Wilcox it is alleged that the land patented to him was patented under the provisions of the act of Congress approved April 24th, 1820, entitled "An act making further provisions for the sale of public lands," and the acts supplemental thereto; that the lands patented were the northeast quarter and the southeast quarter of section fifteen, township five, south of range seventeen east of the Willamette meridian, in Oregon, and were situated more than twenty miles and less than forty miles from the line of the general route of the Northern Pacific Railroad Company's road, and that said patent was dated the 28th day of December, 1894.

It is stipulated by the parties to the above-entitled suits, by
3 their respective attorneys, that unless the above-entitled court shall otherwise order, only the record in the above-entitled suit of The Eastern Oregon Land Co. *vs.* John D. Wilcox shall be printed, and that the appeal in the case of The Eastern Oregon Land Co. *vs.* E. I. Messinger may be heard and submitted in said court without printing the record thereof.

DOLPH, NIXON & DOLPH,
*Solicitors for Complainants and Appellants.*
JNO. M. GEARIN AND
J. L. STORY,
*Solicitors for Defendants and Respondents.*

(Endorsed:) Filed Jan. 9, 1897. F. D. Monckton, clerk.

*Citation.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

To John D. Wilcox, Esq., Greeting:

Whereas the Eastern Oregon Land Company has lately appealed to the United States circuit court of appeals for the ninth circuit, from a decree rendered in the circuit court of the United States for the district of Oregon, in your favor, and has given the se-
4 curity required by law, you are, therefore, hereby cited and admonished to be and appear before said circuit court of appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this Jan. 5, 1897.

WM. B. GILBERT, *Judge.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

Due and legal service of the within citation is hereby admitted at Portland, in said district, this 5th day of January, A. D. 1897.

JNO. M. GEARIN,
*Of Attorneys for Defendant.*

(Endorsed:) Filed January 5, 1897. J. A. Sladen, clerk, by G. H. Marsh, deputy clerk.

5 In the Circuit Court of the United States for the District of Oregon, April Term, 1896.

Be it remembered, that on the 8th day of July, 1896, there was duly filed in the circuit court of the United States for the district of Oregon, a bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant, }
*vs.*
JOHN D. WILCOX, Defendant. }

*Bill of Complaint.*

To the honorable judges of the circuit court of the United States for the district of Oregon, sitting in equity:

The Eastern Oregon Land Company brings this, its bill of complaint, against the above-named defendant, and complaining says:

6 I.

That the complainant, The Eastern Oregon Land Company, is and was during all the times hereinafter mentioned, a corporation

duly incorporated under the laws of the State of California, and was and is a citizen of said State, and that the defendant above named is a citizen and resident of the State of Oregon.

II.

Your orator further shows to your honors that during all the times hereinafter mentioned The Dalles Military Road Company was and now is a corporation duly incorporated and organized under and by virtue of the general laws of the State of Oregon.

III.

Your orator further shows to your honors that on the 25th day of February, 1867, the Congress of the United States passed and the President of the United States duly approved an act granting to the State of Oregon, to aid in the construction of a wagon road from Dalles City, on the Columbia river, by way of Camp Watson, Canyon City, Mormon or Humbold basin, to a point on Snake river opposite Fort Boise in Idaho Territory, the alternate sections of
public lands designated by odd sections to the extent of three
7 miles in width on each side of said road; that said act provided that the lands granted should be exclusively applied to the construction of the road and to no other purpose and that they should be disposed of only as the work progressed and that lands lying within the limit fixed by said act and theretofore reserved or appropriated should be reserved from the operation of said act except so far as it was necessary to locate the road over the same, in which case the right of way to the width of 100 feet was granted; that said act further provided that the grant should not embrace mineral lands of the United States and that the lands thereby granted to the State of Oregon should be disposed of by the Legislative Assembly thereof for the purpose aforesaid and no other, and that the said road should be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any of the property, troops, or mails of the United States; that said act also authorized the State of Oregon to locate and use in the construction of said road an additional amount of the public lands not previously reserved to the United States or otherwise disposed of and not exceeding ten miles in distance from the general route of the road and equal to the amount reserved within the limits of the grant in place from the operation of the act, said lieu lands to be selected in alternate sections as provided therein; that said act further provided that the lands thereby granted to the State of Oregon should be disposed of
only in the following manner, that is to say, when the gov-
8 ernor of the State should certify to the Secretary of the Interior that ten coterminous miles of said road were completed then a quantity of the land granted by the act not exceeding thirty sections might be sold and so on from time to time until said road should be completed and that if the road was not completed within five years no further sales should be made and the

lands remaining unsold should revert to the United States, and also the surveyor general of the district of Oregon should cause the lands granted by the act to be surveyed at the earliest practical period after the said State should have enacted the necessary legislation to carry the said act of Congress into effect.

IV.

And your orator further shows unto your honors that on the 20th day of October, 1868, the Legislative Assembly of the State of Oregon passed and the governor approved an act entitled "An act dedicating certain lands to Dalles Military Road Company," which act after setting forth the act of Congress aforesaid granted to the Dalles Military Road Co. all lands, rights of way, rights, privileges, and immunities granted or pledged to the State of Oregon by the said act of Congress for the purposes of aiding said Dalles Military Road Company in constructing the road mentioned and described in said act of Congress aforesaid and upon the conditions and immunities therein described; and further that the said Legis-
9 lative Assembly granted and pledged to the said Dalles Military Road Co. all moneys, lands, rights, privileges, and immunities which might thereafter be granted to the State of Oregon to aid in the construction of said road for the purposes and upon the conditions mentioned in said act of Congress or which might be mentioned in any further grant of money or land to aid in the construction of such road, and the said act of the Legislative Assembly of the State of Oregon authorized the said Dalles Military Road Co. to locate, subject to the approval of the governor of the State of Oregon, all lands within the ten-mile limit prescribed by said act of Congress aforesaid in lieu of land reserved to or disposed of by the United States and lying and being within the limits of the grant as described in the first section of the act of Congress aforesaid.

V.

And your orator further shows unto your honors that the said Dalles Military Road Co. is a private corporation and was duly incorporated and organized on the 30th day of March, 1868, under and by virtue of the general laws of the State of Oregon providing for private corporations and the appropriation of private property therefor, and that the enterprise and business in which the said corporation proposed to engage was the location and construction of a clay road from the city of The Dalles, in the county of Wasco, Oregon, by way of Camp Watson and Canyon City to a point on Snake
10 river opposite Fort Boise in the Territory of Idaho about two miles below the mouth of Owyhee river; that James K. Kelly, N. H. Gates, and Orlando Humason, were the incorporators thereof; that on the 11th day of January, 1871, the Dalles Military Road Co., by Orlando Humason, Victor Trevett, O. S. Savage, O. W. Weaver, and B. W. Mitchell, the then directors thereof, in pursuance of the unanimous vote of the stockholders thereof, duly made and filed supplemental articles of incorporation, and that said supplemental

articles of incorporation contained but one article, which is as follows, to wit: "The enterprise and business in which the said corporation proposes to engage, in addition to the location and construction of a clay road as provided in the original articles of incorporation, is to accept and receive any and all grants of lands and other things of value from the United States and the State of Oregon and to sell and convey and to purchase and to hold land and other property which the said directors of said corporation may deem necessary and convenient for the interests thereof, and to engage in any business incidental to and connected with receiving any such grant and in selling, conveying, purchasing, and holding any land or property that may come into the possession of said company, also to establish and keep a toll-road on any part of the road belonging to said company.

VI.

11 And your orator further represents and shows unto your honors that prior to the 23rd day of June, 1869, the said Dalles Military Road Co. duly surveyed and definitely located the line of its said wagon road between the points and upon the route designated in said act of Congress and in the said act of the Legislative Assembly of the State of Oregon, and had fully constructed and completed its said road and had filed in the executive office of the governor of the State of Oregon a plat or map of the said Dalles military road, upon which was traced and shown the definite location of said wagon road, from its terminus at the city The Dalles, Oregon, to its terminus on Snake river, and the limits of the grant of land in place made to the State of Oregon by the said act of Congress to aid in the construction of said road, and also the indemnity limits of said grant, and that on June 23rd, 1869, the governor of Oregon certified that the plat or map of said Dalles Military Road Co. had been duly filed in the executive office, that it showed the location of the line of route upon which said road was constructed, in accordance with the requirements of the act of Congress approved February 25th, 1867, entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles city, on the Columbia river, to Fort Boise, on Snake river," and with the act of the Legislative Assembly of the State of Oregon approved October 20th, 1868, entitled "An act donating certain lands to the Dalles Military Road Co.," and the said governor
12 of Oregon at that date further certified that he had made a careful examination of said road since its completion and that the same was built in all respects as required by the said above-recited acts and was then accepted, as will more fully appear by said certificate, of which the following is a copy:

EXECUTIVE OFFICE, SALEM, OREGON, *June 23rd*, 1869.

I, George L. Woods, governor of the State of Oregon, do hereby certify that this plat or map of the Dalles military road has been duly filed in my office by the Dalles Military Road Co., and shows, in connection with the public surveys as far as the said public sur-

veys are completed, the location of the line of route as actually surveyed and upon which their road is constructed, in accordance with the requirements of the act of Congress approved February 25th, 1867, entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles city, on the Columbia river, to Fort Boise, on Snake river," and with the act of the Legislative Assembly of the State of Oregon, approved October 20th, 1868, entitled "An act donating certain lands to Dalles Military Road Company;" and I further certify that I have made a careful examination of said road since its completion and that the same is built in all respects as required by the said above-recited acts, and that said road is accepted.

13 In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Oregon.

Done at Salem, Oregon, June 23rd, 1869.

GEORGE L. WOODS. [SEAL.]

Attest: SAMUEL E. MAY.

VII.

And your orator further shows unto your honors that upon the filing of the said plat or map in the executive office of the governor of the State of Oregon showing the definite location of its said road, in connection with the public surveys, and upon the execution of the said certificate by the governor of Oregon certifying to the completion of said road, the grant made by the said act of Congress of February 25th, 1867, to the State of Oregon to aid in the construction of said road became located and definitely fixed and attached to the odd sections of land as shown by the public surveys within the limits of three miles on each side of said road as located and constructed.

VIII.

And your orator further shows unto your honors that the said Dalles Military Road Co. duly filed in the office of the Secretary of the Interior of the United States a map or plat of the said Dalles military road, showing the definite location thereof with reference to the public surveys so far as then made, and the said cer-

14 tificate of the said governor of the State of Oregon certifying to the construction of said road, and that said map was duly executed in accordance with the requirements and regulations of the Interior Department of the United States and was accepted and received and filed in said department; and that on December 18th, 1869, the Commissioner of the General Land Office of the United States, by order of the Secretary of the Interior, withdrew from sale the odd-numbered sections within three miles from each side of said wagon road, as delineated and shown on said maps, in favor of the Dalles Military Road Company.

IX.

And your orator further shows unto your honors that the Congress of the United States, by an act approved June 19th, 1874, en-

titled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," provided that in all cases where lands have been granted by Congress to the State of Oregon to aid in the construction of certain wagon roads and the certificate of the governor of Oregon should show that any such road had been constructed and completed as in said acts required, patents should be issued in due form to the State of Oregon for such lands, unless the State should by public act have transferred its interests in such lands to any corporation, in which case the said lands were to be patented to such corporation.

15 X.

And your orator further shows unto your honors that Edward Martin, then a resident of San Francisco, in the State of California, placing confidence in the truth of the certificate of the governor of the State of Oregon, dated June 23rd, 1869, that said road had been duly constructed in accordance with the requirements of said act of Congress approved February 25th, 1867, and also placing confidence in the order of the Commissioner of the General Land Office, dated December 18th, 1869, withdrawing said lands within the limits of the said grant in the State of Oregon in favor of the Dalles Military Road Company, from sale, and also believing that the said act of Congress, approved June 18th, 1874, would be carried into effect by the issuance of patents to the said Dalles Military Road Company for said lands, and without any notice or knowledge, actual or constructive, that any portion of said grant was claimed by the Northern Pacific Railroad Company or any other corporation or person, or that any portion of the lands within the limit of the grant in place or within the indemnity limits to the said State of Oregon to aid in the construction of said road were excepted therefrom on account of a grant to the Northern Pacific Railroad Company or to any company or person or for any other reason, did on the 31st day of May, 1876, purchase in good faith, for a valuable consideration, to wit, the sum of $125,000.00, then paid by said Edward Martin

16 to said Dalles Military Road Company, all the lands embraced in the grant to said company, except such portions thereof as had been previously sold by it; that previous to the time of paying said sum of $125,000.00 purchase-money and receiving said deed, said Edward Martin had no notice or knowledge, actual or constructive, of any claim by the said Nothern Pacific Railroad Company or by any corporation or person or by the Government of the United States that any portion of the lands granted to the State of Oregon to aid in the construction of said wagon road were excepted or claimed to be excepted from said grant on account of any previous grant to the Northern Pacific Railroad Company or any corporation or person or for any reason whatever; that thereupon the said Edward Martin became and was a *bona fide* purchaser for a valuable consideration of all said lands then owned by the said Dalles Military Road Company, which were then conveyed to him by the said corporation, as will more fully appear by said deed, of which a copy is attached to this bill of complaint and marked Exhibit "A."

XI.

That said Edward Martin afterwards, to wit, on January 31st, 1877, executed and delivered to D. V. B. Henarie, a deed of trust, whereby he acknowledged that said D. V. B. Henarie was the owner of the undivided one-fourth of all the lands mentioned and described in the said deed of the Dalles Military Road Co. executed to the said Edward Martin and that he held the same in trust for
17 the said Henarie, which deed of trust was recorded in Wasco county, Oregon, on May 7th, 1884, in volume A, page 265, of Miscellaneous Records, also in Baker county, Oregon, on May 10th, 1884, in volume 2, page 317, of Record of Leases and Agreements, also in Grant county, Oregon, on May 27th, 1884, in volume A, page 584, of Miscellaneous Records.

XII.

And your orator further shows unto your honors that when said Edward Martin purchased said lands on May 21st, 1874, as hereinbefore stated, said D. V. B. Henarie paid one-fourth of the consideration of the same, to wit, one-fourth of $125,000.00; that he, the said D. V. B. Henarie made said purchase in good faith, relying upon the certificate of the governor of the State of Oregon that said road had been constructed according to the act of Congress approved February 25th, 1867, and also relying upon the act of Congress approved June 18th, 1874, that patents in due form of law would be issued to the Dalles Military Road Company for said lands; that he had no notice or knowledge, actual or constructive, at the time he paid one-fourth of the said purchase-money and when said deed was executed and delivered to said Edward Martin that any portion of the land so granted to the State of Oregon to aid in the construction of said road *were* claimed by the Northern Pacific Railroad Company or by any corporation or person adversely to said Dalles Military Road Co., or that any portion of the grant of lands
18 in place or within the indemnity limits to the said State of Oregon to aid in the construction of said road was excepted from said grant or claimed to be excepted from said grant by the United States, on account of the same being included in any grant to the Northern Pacific Railroad Company or any other company or person.

XIII.

And your orator further shows unto your honors that afterwards, to wit, on the 12th day of May, 1880, the said Edward Martin died intestate in the city of San Francisco, in the State of California, leaving a widow, Eleanor Martin, and leaving as his heirs, Thomas S. Martin, Edward Martin and Sarah A. F. Wilcox, who were then of lawful age, and James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, who were then minors; that in March, 1882, the interest of said minors in said lands *were* sold at a guardian sale by order of the county court of the State of Oregon for the county of Wasco, at which sale the interest of said

minors in said land was purchased in good faith, for a valuable consideration, by Peter Donahue and James Phelan, of San Francisco, California, as will more fully appear by Exhibit "B" attached hereto and made a part hereof; that at the time of the purchase of said lands by said Peter Donahue and James Phelan neither of them had any notice or knowledge, actual or constructive, that any portion of the lands within the limits of the grant made as
19 aforesaid by Congress to the State of Oregon to aid in the construction of said road or within the indemnity limits was claimed by the Northern Pacific Railroad Company or by any corporation or person adversely to the said Dalles Military Road Company, or was claimed by the United States or any corporation or person to be excepted from said grant or to have been excepted from said grant on account of their having been previously granted to the Northern Pacific Railroad Company or to any corporation or person or for any other reason; that on the 11th day of August, 1884, all the heirs of the said Edward Martin and all persons who held an interest by purchase in said lands, to wit, P. J. Martin, Eleanor Martin, D. V. B. Henarie, Peter Donahue, Edward Martin, James V. Martin, Thomas S. Martin, Genevieve E. Walker and Joseph W. Winans, sold and by deed conveyed all their interest in the said lands to the Eastern Oregon Land Company, a corporation duly incorporated and organized under the laws of the State of California as will more fully appear by Exhibit "C" attached hereto and made a part hereof.

XIV.

And your orator further shows unto your honors that the said Dalles Military Road Co., duly selected, among other lands forming a portion of its said grant of lands in place, and which had been duly earned by the construction of its said wagon road, the
20 following-described land, to wit: the northeast quarter and the southeast quarter of section fifteen in township five south of range seventeen east of the Willamette meridian, and situated in the county of Sherman, and State of Oregon, the same lying within the limit of the grant of land in place to the said State of Oregon by the said act of February 25th, 1867, to aid in the construction of the said military wagon road, and being a portion of the lands withdrawn in favor of said Dalles Military Road Co., on the said 18th day of December, 1869, and being situated on the south side of the said line of the general route of the Northern Pacific railroad as delineated on said map filed by said company on the 13th day of August, 1870, and being situated more than twenty miles and less than forty miles from said line of general route of the Northern Pacific railroad, and being then unoccupied land and there being no claim thereto adverse to the said company, and that said selection was embraced in list No. —, and said list was duly certified by the register and receiver of the local land office at Dalles city to the Commissioner of the General Land Office at Washington city, District of Columbia.

XV.

And your orator further shows unto your honors that the Congress of the United States by an act entitled "An act to grant lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast, etc., "ap-
21 proved July 2nd, 1864, created the corporation of the Northern Pacific Railroad Company, and authorized it to build a railroad from a point on Lake Superior, in Wisconsin or Minnesota, westerly by the most eligible route north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch via the Columbia river to a point at or near Portland, in the State of Oregon, and granted to said company every alternate section of land, not mineral, designated by odd numbers, to the amount of twenty odd sections to the mile on each side of said railroad line as said company might adopt, through the Territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passed through any State and whenever on the line thereof the United States had full title not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of said road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time any of said sections or parts of sections should have been granted, sold, reserved or occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands should be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers not more than ten miles beyond the limits of said alternate sections.

XVI.

22 And your orator further shows unto your honors that by a joint resolution entitled "A resolution authorizing the Northern Pacific Railroad Co. to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes," approved May 31st, 1870, the Congress of the United Stater authorized the said Northern Pacific Railroad Co. to locate and construct under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main branch line across the Cascade mountains to Puget sound.

XVII.

And your orator further shows unto your honors that on the 13th day of August, 1870, the officers of the Northern Pacific Railroad Co. filed a map or plat of the general route of its road and filed the same in the office of the Commissioner of the General Land Office and presented the same to the then Secretary of the Interior, showing among other things the general route of its said road following the Columbia river from Wallula in the then Territory of Washing-

ton to a point on the north side of said river opposite Portland in the State of Oregon, and the Secretary of the Interior did on the 13th day of August, 1870, accept said map and direct the honorable Commissioner of the General Land Office to withdraw on account of
23 the grant to the said Northern Pacific Railroad Company from sale, pre-emption, homestead or other disposal all odd-numbered sections not sold or reserved and to which prior rights had not attached within twenty miles on each side of the route of the said Northern Pacific Railroad Company lying south of the town of Steilacoom, in the State of Washington, and that on the 27th day of October, 1870, the honorable Secretary of the Interior Department wrote to the honorable Commissioner of the General Land Office as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Oct.* 27, 1870.

SIR: In my letters of the 13th and 16th inst. last, a withdrawal of lands for twenty miles on each side of the route of the Northern Pacific Railroad in Washington was ordered to be made. That withdrawal will be increased to forty miles on each side of the route, and you will issue instructions accordingly.

Very respectfully your obedient servant,

J. D. COX, *Secretary.*

To Hon. John S. Wilson, Commissioner of the General Land Office.

XVIII.

And your orator further shows unto your honors that the line of the road of the said Northern Pacific Railroad Company between Wallula and Portland or to a point opposite Portland was never surveyed, that the said line of said road between the said points was never definitely located or fixed by said company, that
24 no map of the definite location of said road was ever filed in the office of the Commissioner of the General Land Office at Washington city or in the Interior Department, that the said Northern Pacific Railroad Company never constructed any portion of its said road between the said town of Wallula and the said city of Portland, and that the grant made or claimed to have been made by said last-mentioned act of Congress and the said joint resolution of May 31st, 1870, never was located or fixed for that portion of the road of said Northern Pacific Railroad Company between Wallula and the city of Portland; and that the said grant to the Northern Pacific Railroad Company to aid in the construction of said road between said points never took effect and the said Northern Pacific Railroad Company never acquired any right or title to or interest in any of the lands embraced within the limits of the grant made by said act of Congress of February 25th, 1867, to the State of Oregon to aid in the construction of said wagon road.

XIX.

And your orator further shows unto your honors that upon the filing of the said map of general route of the line of its road by the

said Northern Pacific Railroad Company with the Commissioner of the General Land Office on the 13th day of August, 1870, the Secretary of the Interior directed the withdrawal of the odd-numbered sections lying within the supposed limits of the grant of lands
25 in place to the Northern Pacific Railroad Company as aforesaid, but did not determine or designate the number of sections to the mile or the limits of the supposed grant of lands in place to the Northern Pacific Railroad Company within the State of Oregon, but that the honorable Commissioner of the General Land Office erroneously and wrongfully transmitted to the local land offices in Oregon plats showing the general route of the road of the said Northern Pacific railroad as located and designated upon the said map filed by the Secretary of the Interior August 13th, 1870, and showing the limit of the grant in place to the Northern Pacific Railroad Company to be in Oregon between Wallula and Portland forty miles south of the line of said general route of its road, that the lands in place granted to the State of Oregon by the act of February 25th, 1867, to aid in the construction of said wagon road and which had been by the Commissioner of the General Land Office withdrawn in favor of the Dalles Military Road Co. on the 18th day of December, 1869, situated within forty miles of the line of the general route of said Northern Pacific railroad as designated on said maps were included within the limits of the lands in place designated upon the said maps transmitted to the register and receiver of the local land offices in Oregon as the limits of the lands in place granted to the said Northern Pacific Railroad Company, and that the register and receiver of the said local land offices in Oregon, and the honorable Commissioner of the General Land Office and the honorable Secretary of the Interior have since wrongfully claimed and the United States now wrongfully claims that the lands
26 situated within the limits of the grant in place to the State of Oregon by the said act of February 25, 1867, and lying within forty miles of the line of the general location of the road of said Northern Pacific Railroad Company, as designated aforesaid, were excepted from the grant to the State of Oregon under said act and had been previous to the date of the passage of said grant granted to the Northern Pacific Railroad Company and upon the alleged forfeiture of the unearned portion of the grant to the Northern Pacific Railroad Company became public lands of the United States.

XX.

And your orator further shows unto your honors that by an act of Congress to forfeit certain lands theretofore granted for the purpose of aiding in the construction of railroads and other purposes, approved September 29th, 1890, the United States resumed title to and restored to the public domain so far as Congress had power so to do, all lands theretofore granted to aid in the construction of railroads opposite to and coterminous with the portion of such railroad not then completed and in operation for the construction or benefit of which such lands were granted.

XXI.

And your orator further shows unto your honors that after the passage of said act the Secretary of the Interior of the United States wrongfully assumed and claimed that the odd sections of the public land on the south side of and within forty miles of the line
27 of the general route of the said road of the Northern Pacific Railroad Company between Wallula and a point on the north side of the Columbia river opposite the city of Portland, in the State of Oregon, as said line was traced and designated on the said map of general route filed by the said Northern Pacific Railroad Company in the office of the Commissioner of the General Land Office on the 13th day of August, 1870, as aforesaid, had been granted to said Northern Pacific and were reserved and excepted from the said grant made to the State of Oregon by the said act of February 25th, 1867, to aid in the construction of said wagon road, and that by said act of Congress forfeiting unearned railroad grants the said lands within the limits aforesaid had reverted to and become public lands of the United States open to settlement and sale under the land laws of the United States providing for the sale and disposal of the public land, although the said lands were also within the limits of the grant in place to said Dalles Military Road Company.

XXII.

And your orator further shows unto your honors that the said Secretary of the Interior thereupon caused the said lands to be opened to settlement and sale and thereupon the defendant settled upon the said tract of land hereinbefore described as: The northeast quarter and the southeast quarter of section fifteen in township five, south of range seventeen, east of the Willamette meridian,
28 and situated in the county of Sherman and State of Oregon, and made application to purchase the same under the act of Congress making further provision for the sale of public land, approved Apr. 24, 1820, and such proceedings were thereafter had upon said application that on the 28th day of Sept., 1894, the President of the United States issued a patent for the same to the said defendant, a copy of which is hereto attached, marked Exhibit "D;" that said Secretary of the Interior had no jurisdiction or authority to open the said lands within the limits of the grant of lands in place to the State of Oregon to aid in the construction of said Dalles Military Road Co. to settlement or to permit the defendant to settle upon or purchase the said lands and the President of the United States had no jurisdiction or authority to issue a patent therefor.

XXIII.

And your orator further shows unto your honors that at and before the time the defendant settled upon said tract of land and made claim thereto and made application to purchase the same, he, the said defendant, well knew that the said lands were within the limits of the grant in place to the said Dalles Military Road Co. and that

the same were claimed by the said Dalles Military Road Co. and by its successors and assigns under said grant.

XXIV.

And your orator further shows unto your honors that if it
29 had been true that the lands in Oregon within forty miles of the general route of the said Northern Pacific Railroad Company's road between Wallula and Portland, as designated on said map of the general route of its road filed by the said Northern Pacific Railroad Co. with the Secretary of the Interior on the 13th day of August, 1870, had been granted to the said Northern Pacific Railroad Co. by the said act of July 2nd, 1864, and the said joint resolution of May 31st, 1870, said grant had taken effect and that the said lands within the limits aforesaid were excepted from the grant to the said Dalles Military Road Co., this plaintiff being a *bona fide* purchaser of said lands would have had a preference right to apply for and purchase the lands so patented to the defendant by the United States, under the provisions of section five of an act of Congress, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3rd, 1867, but that your orator received no notice and had no notice or knowledge of the application of the said defendant to purchase said land and no opportunity to apply to purchase the same under the provisions of said section five or otherwise.

XXV.

And your orator further shows unto your honors that a patent having been issued to the defendant for the said lands, the Interior Department of the United States has no longer jurisdiction of the same and cannot give to your orator the most convenient
30 and conclusive evidence of his title to said land and cannot issue to your orator a patent for the same as required by the said act of June 18th, 1874, until the patent to the defendant has been canceled, annulled and set aside; and that said patent is a cloud upon the title of your orator to said lands described therein, and that your orator is remediless in a court of law.

Your orator therefore prays that the said patent issued to the defendant described in this bill of complaint be decreed fraudulent and void and be canceled and annulled; that your orator may be decreed to be the owner in fee-simple of the land described in said patent and entitled to the immediate possession thereof, and may have the process of this court to put it into possession thereof; or if it shall be determined by the court that the said defendant has acquired by said patent or otherwise any legal right or title to the property described therein, that he be declared the trustee of said right or title for your orator and be ordered and decreed to convey the said land to it, and that your orator may have such other and further relief as the facts will warrant or as to equity seems meet; that the writ of subpœna may issue requiring the defendant to

appear in this regard under certain pains and penalties
31 therein prescribed and answer to the foregoing bill of complaint, and that the defendant pay the costs, expenses and disbursements of this suit.

THE EASTERN OREGON LAND CO.,
[SEAL.] By T. P. BEACH, *Secretary.*
JAMES K. KELLY,
J. N. DOLPH,
RICHARD NIXON,
C. V. DOLPH,
*Solicitors for Complainant.*

CITY AND COUNTY OF SAN FRANCISCO, } ss:
*State of California,* }

I, T. P. Beach, being first duly sworn, say that I am the secretary of The Eastern Oregon Land Company, complainant above named, and that the statements contained in the foregoing bill of complaint are true, as I verily believe.

T. P. BEACH.

Subscribed and sworn to before me this 6th day of July, 1896.
[SEAL.] A. J. PORTER,
*Notary Public in and for the City and County of San Francisco, State of California.*

32 EXHIBIT "A."

Dalles Military Road Company to Edward Martin. } Deed. Filed for record on the 31st day of May, A. D. 1876.

This indenture, made and entered into this 31st day of May, A. D. 1876, between the Dalles Military Road Company, a corporation duly incorporated, organized and existing under the laws of the State of Oregon, having its principal office and place of business at Dalles city, Wasco county, State of Oregon, the party of the first part, and Edward Martin, of the city and county of San Francisco, State of California, the party of the second part:

Witnesseth: That the said party of the first part, the Dalles Military Road Company, a corporation as aforesaid, for the sum of one hundred and twenty-five thousand dollars to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, released and conveyed, and by these presents, it does grant, bargain, sell, release and convey unto the said party of the second part, his heirs and assigns, all the land lying and being in the State of Oregon granted or intended to be granted to said State by act of Congress approved February 25th, 1867, entitled, "An act granting lands to the State of Oregon
33 to aid in the construction of a military wagon road from Dalles city on the Columbia river to Fort Boise on the Snake river," and the right to a patent or patents for said lands granted to

said party of the first part by act of Congress approved June 18th, 1874, entitled, "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," which said lands were granted or intended to be granted by the State of Oregon to the said Dalles Military Road Company, by an act of the Legislative Assembly of said State of Oregon, approved October 20th, 1868, entitled, "An act donating certain lands to the Dalles Military Road Company," which said several acts are hereby made part hereof, and all the right, title and interest acquired or to be acquired by the party of the first part under the said several acts hereinbefore referred to, or either of them; and also all future right, title, interest, claim, property and demand, which the party of the first part may at any time hereafter acquire to said lands or any part thereof, or to any lands or to any patents or patent therefor by virtue of said acts of Congress, or either of them, and said act of the Legislative Assembly of the State of Oregon, whether said lands are surveyed or unsurveyed by virtue of any further compliance or any preceding compliance with the requirements of said acts or otherwise, subject to the payment by said party of the second part, of whatever may be due the United States for entering and patenting said lands.

It being the intention of the party of the first part to convey, and it does hereby convey to the party of the second part the said lands, and all the right, title and interest acquired by said party of
34 the first part, under said acts or either of them in said lands, or any part thereof, or any lands, being the interest in and to the lands and premises hereinbefore described, together with any and all future interest that it may hereafter acquire or now possess, by virtue of any further compliance with all or any of said several acts referred to; reserving and excepting from this conveyance, however, all sales of lands heretofore made by the party of the first part.

The said party of the first part hereby covenants and agrees with the party of the second part, that it will at any time when desired by said party of the second part, make to him, his heirs and assigns, any further conveyance and assurance of title to the lands aforesaid, and every part thereof, and said party of the first part covenants and agrees with said party of the second part to keep up its corporate organization and to do every act and thing necessary and requisite to perfect the title to all the lands included in the grant aforesaid.

To have and to hold the lands hereby granted and every part and parcel thereof unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has caused its corporate seal to be affixed to these presents, and the same to be signed by its president and secretary by resolution of the board of directors thereof duly passed to that effect at Dalles city, Wasco county, State of Oregon, this 31st day of May, 1876.

P. J. MARTIN,
*Pres. D. M. R. Co.*.
C. N. THORNBURY,
*Sec. D. M. R. Co.*

35 And witness the seal thereof.

Signed, sealed and delivered in the presence of—
[SEAL.] BEN. KORTEN.
J. B. CONDON.

STATE OF OREGON, } ss:
*County of Wasco,* }

On the thirty-first day of May, A. D. 1876, before the undersigned, a notary public in and for Wasco county, State of Oregon, came the above-named P. J. Martin, president of the Dalles Military Road Company, and C. N. Thornbury, secretary of said company, both of whom are well known to me to be the persons described — and who executed the foregoing conveyance, and the said P. J. Martin acknowledged to me that he had executed the said conveyance as president of the said Dalles Military Road Company for the objects and purposes therein stated in compliance with a resolution passed by the board of directors of said company on the 31st day of May, A. D. 1876, and the said C. N. Thornbury acknowledged to me that he had executed the said conveyance for the purpose therein set forth, and in attestation thereto affixed to said conveyance the corporate seal of the Dalles Military Road Company as secretary thereof, in compliance with a resolution of the board of directors of said company.

36 In witness whereof, I have hereunto set my hand and affixed my notarial seal on the day and year first above written in this petition.

[SEAL.] JAMES B. CONDON,
*Notary Public for Oregon.*

EXHIBIT "B."

This indenture, made the twenty-first day of March, A. D. 1882, by and between Eleanor Martin, the duly appointed and qualified guardian of the persons and estates of James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors, party of the first part, and Peter Donahue and James Phelan, of the city of San Francisco, State of California, parties of the second part, witnesseth:

That, whereas, on the 3rd day of January, A. D. 1882, the county court of Wasco county, in the State of Oregon, made an order and license of sale authorizing the said party of the first part to sell certain real estate of the said minors, situate in the counties of Wasco, Grant and Baker, in the State of Oregon, and particularly described in the said order and license of sale, and which said order and license of sale now on file and of record in the said county court, Wasco county, are hereby referred to and made a part of this indenture; and

Whereas, under and by virtue of the said order and license of sale, and pursuant to legal notices given thereof, the said
37 party of the first part on the 6th day of February, A. D. 1882, at 2 o'clock — noon, at the court-house door, at The Dalles, in

the county of Wasco, State of Oregon, offered for sale at public auction, and subject to confirmation by the said county court of Wasco county, the portion of the said real estate situated in the said county of Wasco, and specified and described in said order and license of sale, as aforesaid; and at such sale the said parties of the second part became the purchasers of the whole of the said real estate hereinafter particularly described, situated in Wasco county aforesaid, for the sum of $57,500, they being the highest and best bidders, and that being the highest and best sum bid for the same; and

Whereas, the said county court of Wasco county, upon a due and legal return of her proceedings under the said order and license of sale made by the said party of the first part on the 24th day of February, 1882 did on the 6th day of March, A. D. 1882, make an order confirming the said sale and directing conveyances to be made, executed and delivered to the said parties of the second part, and which order of confirmation now on file and of record in the said county court of Wasco county is hereby referred to and made a part of this indenture:

Now, therefore, the said Eleanor Martin, the guardian of the persons and estate of the said minors, James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, as aforesaid, the party of the first part, pursuant to the order last aforesaid of the said county court of Wasco county, for and in consideration of the said sum of $57,500 to her in hand paid by
38 the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed unto the said parties of the second part, their heirs and assigns forever, all the right, title, interest and estate of the said James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors, in and to all that part of the lands known as the Dalles military road lands, which are situate, lying and being in the county of Wasco, State of Oregon, the said Dalles military road lands, being the alternate sections of the public lands of the United States as surveyed or to be surveyed by the United States, designated by odd numbers, to the extent of three sections in width on each side of the military road constructed by the Dalles Military Road Company from Dalles City on the Columbia river to Fort Boise on the Snake river, and including such lieu lands as have been or may hereafter be selected and located, not exceeding ten miles in distance from said road under and in pursuance of the act of Congress entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles city on the Columbia river to Fort Boise on the Snake river," passed February 25, 1867, and any other acts of Congress and the acts of the Legislative Assembly of the State of Oregon relating or pertaining to the said Dalles military road lands, saving and excepting those portions of the Dalles military road lands which have been heretofore lawfully sold and conveyed by the said Dalles Military Road Company to other persons than Edward Martin and by said Edward Martin in his lifetime, the said lands so previously
39 conveyed not being included in this sale and conveyance, which said lands are listed in part only and amount to 247,230

acres, more or less. The interest of said minors in and to the above mentioned and designated lands so sold is five-eighths of three-fourths thereof, subject to the right of dower therein and thereto held by and belonging to Eleanor Martin, the widow of Edwa[illegible] Martin, deceased.

Together with the tenements, hereditaments and appurtenances whatsoever to the same belonging or in anywise appertaining.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the parties of the second part, their heirs and assigns, to their sole use, benefit, and behoof forever.

In witness whereof the said party of the first part, guardian as aforesaid, has hereto set her hand and seal the day and year first above written.

[SEAL.] ELEANOR MARTIN,
*Guardian of the Persons and Estates of James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, Minors.*

Signed, sealed, and delivered in the presence of—
T. P. BEACH.
SAM'L S. MURFEY.

40 STATE OF CALIFORNIA, } *ss:*
*City and County of San Francisco,* }

On this 22nd day of March, A. D. 1882, personally came before me, Samuel S. Murfey, a commissioner of deeds for the State of Oregon, residing in the city and county of San Francisco, State of California, Eleanor Martin, guardian of the persons and estate of James Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, minors, to me personally known to be the identical person described in and who executed the foregoing deed and who acknowledged to me that she executed the same as guardian aforesaid freely for the uses and purposes therein named.

In witness whereof I have hereunto set my hand and affixed my official seal this 22nd day of March, A. D. 1882.

[SEAL.] SAM'L S. MURFEY,
*Commissioner of Deeds for the State of Oregon.*

EXHIBIT "C."

Peter Donahue *et al.* to The Eastern Oregon Land Co. } Deed. Filed October 15th, 1884, at 10.30 a. m.

This indenture, made and entered into this eleventh day of August, A. D. one thousand eight hundred and eighty-four by and between Peter Donohue and Annie Donahue, his wife,
41 D. V. B. Henarie and Mary A. Henarie, his wife, Eleanor Martin, P. J. Martin and Margaret A. Martin, his wife, of the city and county of San Francisco, State of California, and James V.

Martin of the city and county of Los Angeles, State aforesaid, and Thos. S. Martin and Ada B. Martin, his wife, and Edward Martin of the city of Portland, State of Oregon, and Barton L. Walker and Genevieve E. Walker, his wife, of the city of Washington, District of Columbia, parties of the first part, and the Eastern Oregon Land Company, a corporation duly organized and incorporated under the laws of the State of California and having its office and principal place of business in the city and county of San Francisco, the party of the second part.

Witnesseth: Whereas, the said parties of the first part are the owners of and have each an undivided interest in common in the lands hereinafter mentioned and described in the respective proportions following, to wit: The said Peter Donahue three-sixteenths ($_{1}^{3}{}_{6}$), the said D. V. B. Henarie four-sixteenths ($_{1}^{4}{}_{6}$), the said Eleanor Martin four-sixteenths ($_{1}^{4}{}_{6}$), the said P. J. Martin one-sixteenth ($_{1}^{1}{}_{6}$), the said James V. Martin one-sixteenth ($_{1}^{1}{}_{6}$), the said Thomas S. Martin one-sixteenth ($_{1}^{1}{}_{6}$), the said Edward Martin one-sixteenth ($_{1}^{1}{}_{6}$), and the said Genevieve E. Walker one-sixteenth ($_{1}^{1}{}_{6}$); and whereas the said parties of the first part have negotiated with the said party of the second part for the sale of the said lands upon terms which have been mutually agreed upon by and between the several and respective parties hereto of the first and second parts; Now, therefore, in consideration of the premises and of the sum of one dollar lawful money of the United States of America to each of
42 them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said parties of the first part have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm into the said party of the second part, its successors and assigns, all those certain lands situate, lying and being in the counties of Wasco, Grant and Baker, State of Oregon, granted to the State of Oregon by the act of Congress of the United States of America entitled: "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles city on the Columbia river to Fort Boise on the Snake river, approved February 25th, A. D. 1867, and granted to the said Dalles Military Road Company by an act of the Legislative Assembly of the said State of Oregon, entitled, "An act donating lands to the Dalles Military Road Company," approved October 20th, 1868, being the lands conveyed to Edward Martin, now deceased, by the said The Dalles Military Road Company by its deed bearing date May 31st, 1876, and duly recorded in the office of the county clerk of the said county of Wasco on the 31st day of May, A. D. 1876, in vol. "E," page 435, and in the office of the county clerk of the said county of Grant on the 3d day of June, A. D. 1876, in Book "C," page 195, and in the office of the county clerk of the said county of Baker on the 7th day of June, A. D. 1876, in Book "D" of Deeds, page 200, and commonly known and designated as the Dalles military road lands, a portion of which lands are embraced in the county of Crook recently formed or about to be formed of and from a portion or portions of
43 said Wasco and Grant counties, saving and excepting therefrom and from the operation of this conveyance certain por-

tions and parcels of said Dalles military road lands heretofore sold and conveyed by the said Edward Martin, grantee thereof as aforesaid, in his lifetime and by his successors in interest.

The several and respective interests of the said several and respective parties of the first part by them respectively herein and hereby conveyed being subject to the proper and respective proportions of the debts, charges and expenses belonging thereto respectively, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

P. DONAHUE. [SEAL.]

Signed, sealed and delivered in presence of A. Maude Henarie, Eugene W. Levy.

ANNIE DONAHUE. [SEAL.]

As to signature of Mary A. Henarie, Annie Martin, Eugene W. Levy.

D. V. B. HENARIE. [SEAL.]

44 As to signature of Margaret A. Martin, Eugene W. Levy and Chas. T. Stanley.

MARY A. HENARIE. [SEAL.]

As to signatures of P. Donahue and Annie Donahue, Eugene W. Levy and T. P. Beach.

ELEANOR MARTIN. [SEAL].

As to signature of D. V. B. Henarie, Eugene W. Levy and T. P. Beach.

P. J. MARTIN. [SEAL.]

Witnesses as to signature of Eleanor Martin, Eugene W. Levy and T. P. Beach.

MARGARET A. MARTIN. [SEAL.]

As to signature- of P. J. Martin and James V. Martin, Eugene W. Levy and Chas. T. Stanley. (Seal.)

JAMES V. MARTIN. [SEAL.]

As to signature of Edward Martin, Eugene D. White and Arthur E. Sloan.

THOS. S. MARTIN. [SEAL.]

Witness- to signature of Thos. S. Martin, Eugene D. White and Arthur E. Sloan. (Seal.)

ADA B. MARTIN. [SEAL.]

Witness to signature of Ada B. Martin.

EDWARD MARTIN. [SEAL.]

Witnessess to signatures of B-rton L. Walker and Genevieve Walker, John E. Beal and Albert D. Gilner.

BARTON L. WALKER. [SEAL.]
GENEVIEVE WALKER. [SEAL.]

45 STATE OF OREGON, } ss:
*County of Multnomah,* }

Be it remembered that on this eighteenth day of August, 1884, before me the undersigned, a notary public in and for said county and State, personally appeared the within-named Thos. S. Martin and Ada B. Martin, who are known to me to be the identical persons described in and who executed the within instrument and acknowledged to me that they executed the same, and Ada B. Martin, wife of the said Thos. S. Martin, on an examination made by me separate and apart from her said husband acknowledged to me that she executed the same freely and voluntarily and without fear, coercion or compulsion from any one.

In testimony whereof, I have hereunto set my hand and notarial seal the day and year last above written.

[SEAL.] EUGENE D. WHITE,
*Notary Public for Oregon.*

STATE OF CALIFORNIA, } ss:
*City and County of San Francisco,* }

On the eleventh day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned and sworn and residing in the city and county of San Francisco, State
46 of California, personally appeared James V. Martin and Edward Martin, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] EUGENE W. LEVY,
*Commissioner of Deeds for the State of Oregon in California.*

STATE OF CALIFORNIA, } ss:
*City and County of San Francisco,* }

On the 11th day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon duly appointed, commissioned and sworn and residing in the city and county of San Francisco, State of California, personally appeared Peter Donahue and Annie Donahue, his wife, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein men-
47 tioned; and the said Annie Donahue on examination and separate and apart from her said husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] EUGENE W. LEVY,
*Commissioner of Deeds for the State of Oregon in California.*

STATE OF CALIFORNIA, } ss:
*City and County of San Francisco,* }

On the eleventh day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned and sworn and residing in the city and county of San Francisco, State of California, personally appeared D. V. B. Henarie and Mary A. Henarie, his wife, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned, and the said Mary A. Henarie on examination separate and apart from her said
48 husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] EUGENE W. LEVY,
*Commissioner of Deeds for the State of Oregon in California.*

STATE OF CALIFORNIA, } ss:
*City and County of San Francisco,* }

On this eleventh day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned and sworn, and residing in the city and county of San Francisco, State of California, personally appeared P. J. Martin and Margaret A. Martin, his wife, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; and the said Margaret A. Martin on examination separate and apart from her said husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

49 In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] EUGENE W. LEVY,
*Commissioner of Deeds for the State of Oregon in California.*

STATE OF CALIFORNIA, } ss:
*City and County of San Francisco,* }

On the 25th day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a commissioner of

deeds for the State of Oregon duly appointed, commissioned and sworn and residing in the city and county of San Francisco, State of California, personally appeared Eleanor Martin (widow), to me personally known to be the identical person whose name is subscribed to, who is described in and who executed the annexed and within instrument; and she duly acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] EUGENE W. LEVY,
*Commissioner of Deeds for the State of Oregon in California.*

50 DISTRICT OF COLUMBIA, }
*City and County of Washington,* } *ss:*

On the 12th day of September, one thousand eight hundred —, city of Washington, D. C., personally appeared Barton L. Walker and Genevieve E. Walker, his wife, to me personally known to be the identical persons whose names are subscribed to and who are described in and who executed the annexed and within instrument; and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; and the said Genevieve E. Walker on examination separate and apart from her said husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] JOHN E. BEALL,
*A Commissioner of Deeds for the State of Oregon in and for the District of Columbia.*

EXHIBIT "D."

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

(*Certificate No.* 3904.)

Whereas John D. Wilcox of Sherman county, Oregon,
51 has deposited in the General Land Office of the United States a certificate of the register of the land office at The Dalles, Oregon, whereby it appears that full payment has been made by the said John D. Wilcox according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," and the acts supplemental thereto, for the northeast quarter and the southeast quarter of section fifteen in township five south of range seventeen east of the Willamette meridian in Oregon, containing three hundred and

twenty acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said John D. Wilcox:

Now know ye, that the United States of America in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said John D. Wilcox and to his heirs, the said tract above described.

To have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said John D. Wilcox and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water
52 rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law; and there is reserved from the lands hereby granted a right of way thereof for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and ninety-four and of the Independence of the United States the one hundred and nineteenth.

By the President:

[SEAL.] GROVER CLEVELAND,
By E. MACFARLAND,
*Ass't Secretary.*

Recorded vol. 8*a*, page 222.

L. Q. C. LAMAR,
*Recorder of the General Land Office.*

Filed for record Feb. 28th, A. D. 1895, at 8.20 o'clock a. m.

(Endorsed:) Filed July 8, 1896. J. A. Sladen, clerk.

53 And afterwards, to wit, on the 8th day of July, 1896, there was issued out of said court a *subpœna ad respondendum* in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE EASTERN OREGON LAND COMPANY, Complainant,
*vs.*
JOHN D. WILCOX, Defendant. } No. 2325.

*Subpœna ad Respondendum.*

The President of the United States of America to John D. Wilcox, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of August next, which will be the third day of August, A. D. 1896, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein The Eastern Oregon Land Company is complainant, and you are defendant, and further
54 to do and receive what our said circuit court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said district, or your deputy, to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and ninety-six and of the Independence of the United States the one hundred and —.

[SEAL.] J. A. SLADEN, *Clerk*,
By G. H. MARSH,
*Deputy Clerk.*

Memorandum pursuant to equity rule No. 12 of the Supreme Court of the United States.—The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso*.

(Endorsed:) Returned and filed July 14, 1896. J. A. Sladen, clerk.

55 *Return of Civil Process.*

UNITED STATES OF AMERICA, } *ss.*:
*District of Oregon*, }

I hereby certify that on the 13th day of July, 1896, at 4 miles S. W. from Kent, Sherman county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named John D. Wilcox, by delivering to him personally a true copy of said *subpœna ad respondendum*, duly certified to by me as U. S. marshal,

together with a copy of the complaint in the within-entitled cause, duly certified to by Richard Nixon, of attorneys for the plaintiff.

H. C. GRADY,
*United States Marshal,*
By GEO. HUMPHREY, *Deputy.*

And afterwards, to wit, on the 3d day of August, 1896, there was duly filed in said court a præcipe for appearance of defendant, in words and figures as follows, to wit:

56 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY
*vs.*
JOHN D. WILCOX.

*Præcipe.*

To the clerk of the above-entitled court:

You will please enter my appearance as solicitor in the above-entitled cause for the defendant, John D. Wilcox.

GEARIN, SILVESTONE & BRODIE, *Solicitors.*

(Endorsed:) Filed August 3, 1896. J. A. Sladen, clerk.

And afterwards, to wit, on the 4th day of September, 1896, there was duly filed in said court an answer, in words and figures as follows, to wit:

57 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant,
*vs.*
JOHN D. WILCOX, Defendant.

*Answer.*

Defendant in the above-entitled suit saving and reserving to himself all benefit or advantage of exception or otherwise to which he may be or become entitled by reason of the many errors, uncertainties, and insufficiencies of the bill of complaint of the complainant herein, for answer thereto or to so much and such parts or portions thereof as it may be material or necessary for him to answer unto, answering says:

1st.

This defendant admits all the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of complainant's bill.

58 2nd.

This defendant admits all the allegations contained in paragraph 10 of complainant's bill except that this defendant denies that on

the 31st day of May, 1876, or at the time of the purchase of the lands mentioned in said paragraph 10 or of issuing the deed therefor or at any time Edward Martin had no constructive notice or knowledge that any portion of the lands within the indemnity limits to the said State of Oregon to aid in the construction of said road were excepted therefrom on account of a previous grant to the Northern Pacific Railroad Company, but this defendant alleges in relation thereto that said Edward Martin at the time he made said purchase and received said deed was chargeable with constructive notice of the several acts of Congress in relation to said lands and the effect thereof, and that under said acts of Congress and the acts and doings of the said railroad company no title could pass to said Dalles Military Road Company for the northeast quarter of the southeast quarter of section 15, township 5 south of range 17, east of the Willamette meridian, for the reason that the same was included in the grant to the Northern Pacific Railroad Company by the act of Congress approved July 2, 1864, entitled, "An act to grant lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast, etc."

59

3rd.

The defendant admits all the allegations in paragraph 11 of complainant's bill.

4th.

This defendant admits all the allegations in paragraph 12 of complainant's bill except that this defendant denies that at the time said D. V. B. Henarie made said purchase, or when he paid said money or received the deed as described in said paragraph 12, or at any time, he had no constructive notice that the land so granted to the State of Oregon to aid in the construction of said road was claimed by the Northern Pacific Railroad Company, and denies that said D. V. B. Henaries had not at said or any time constructive notice that said lands in place or within the indemnity limits to the said State of Oregon to aid in the construction of said road were excepted from said grant and claimed to be excepted from said grant by the United States on account of the same being included in the grant to the Northern Pacific Railroad Company by said act of Congress approved July 2nd, 1864. And this defendant alleges in relation thereto that at the time said D. V. B. Henarie made such purchase and at the time he paid one-fourth of said purchase-money, and at all times was chargeable with constructive notice of the several acts of Congress in relation to said lands, and the effect thereof, and that under said acts of Congress, and the acts and

60

doings of said railroad company, no title could pass to said Dalles Military Road Company for the northeast quarter of the southeast quarter of section 15, township 5 south of range 17 east of the Willamette meridian for the reason that the same was included in the grant to the Northern Pacific Railroad Company by the act of Congress above referred to and approved July 2nd, 1864, making the grant of lands to the Northern Pacific Railroad Company.

5th.

This defendant admits all the allegations contained in paragraph 13 of complainant's bill, except this defendant denies that at the time of the purchase of said lands by Peter Donahoe and James Phelan, as set out in said paragraph, said Peter Donahoe and James Phelan did not have constructive notice that said lands so purhased were within the limits of the grant made by Congress to the Northern Pacific Railroad Company, and that the same were claimed by said Northern Pacific Railroad Company, and were claimed by the United States to be exempted from said grant on account of their having been previously granted to the Northern Pacific Railroad Company. And this defendant alleges in relation thereto that the said Peter Donahoe and James Phelan were chargeable with constructive notice of the several acts of Congress in relation to said lands and the effect thereof, and that under said acts of Congress,
and the acts and doings of said railroad company, no title
61 could pass to said Dalles Military Road Company for the
northeast quarter of the southeast quarter of section 15, township 5 south of range 17 east of the Willamette meridian: reason that the same was included in the grant to the Northern Pacific Railroad Company above referred to, approved July 2, 1864, making the grant of lands to the Northern Pacific Railroad Company.

6th.

This defendant admits all the allegations in paragraphs 14, 15, 16, and 17 of complainant's bill, and in relation to the facts set out in said paragraph 17 of complainant's bill, this defendant further says that on March 6, 1865, the then Secretary of the Interior received from Josiah Perham, the then president of the Northern Pacific Railroad Company, a certain letter of that date, a copy of which letter is filed herewith and made a part hereof, marked "Exhibit A." That accompanying said letter was the map referred to therein, a copy of which is herewith filed and made a part hereof, marked Exhibit "B." That on March 9th, 1865, the then Secretary of the Interior transmitted said map to the then Commissioner of the General Land Office, with letter, a copy of which is filed herewith and made a part hereof marked Exhibit "C." That on June 22, 1865, the then Commissioner of the General Land Office returned said map to the Secretary of the Interior with a letter, a copy of which, with its endorsement, is filed herewith and made a part hereof marked Exhibit "D."

62 7th.

This defendant answering paragraph 18 of complainant's bill denies that the grant of lands made by said act of Congress of July 2nd, 1864, and said joint resolution of May 31st, 1870, never was located or fixed for that portion of the road of said Northern Pacific Railroad Company between Wallula and the city of Portland: denies that the said grant to the Northern Pacific Railroad Company to aid in the construction of said road between said points never

took effect. Denies that said Northern Pacific Railroad Company never acquired any right or title to or interest in any of the lands embraced within the limits of the grant made by the act of Congress of February 27th, 1867, to the State of Oregon to aid in the construction of said wagon road.

8th.

Answering paragraph 19 of the complainant's bill this defendant denies that the Commissioner of the General Land Office erroneously or wrongfully transmitted to the local land offices in Oregon the plats described in said paragraph 19 and alleges in relation thereto that said maps were rightfully transmitted to said land offices and said plats are correct. This defendant admits that the Commissioner of the General Land Office and the Secretary
63 of the Interior and the United States claim that said lands were exempted from said grant of the lands to the State of Oregon, and that they had been previous to the passage of said act granted to the Northern Pacific Railroad Company, and upon the forfeiture of the unearned portion of the grant to the Northern Pacific Railroad Company, they became public lands of the United States. And the defendant denies said claim is wrongful, and alleges that the same is rightful and that such are the facts.

9th.

This defendant admits the allegations in paragraph 20 of complainant's bill.

10th.

This defendant admits the allegations in paragraph 21 of complainant's bill, except defendant denies that the act of the Secretary of the Interior as set out in said paragraph was wrongful and alleges that the same was rightful.

11th.

This defendant admits the allegations contained in paragraph 22 of complainant's bill, except that defendant denies that the Secretary of the Interior had no jurisdiction to open said lands for settlement or to permit the defendant to settle thereon or to purchase the same, and denies that the president had no jurisdiction or authority to issue a patent therefor.

64–66 Wherefore this defendant prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

J. L. STORY AND
GEARIN, SILVESTONE & BRODIE,
*Solicitors for Defendant.*

FOLDOU

EXHIBIT "A" TO ANSWER.

WASHINGTON, D. C., *March* 6, 1865.

Hon. J. P. Usher, Secretary of the Interior.

SIR: Under authority of the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget sound, in Washington Territory, via the Columbia river, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your direction the land granted to said company may be marked and withdrawn from sale in conformity to law.

I am respectfully, your obedient servant,

JOSIAH PERHAM,
*Pres. N. P. R. R. Company.*

67 EXHIBIT "C" TO ANSWER.

WASHINGTON, D. C., *March* 9, 1865.

SIR: Herewith I transmit a map upon which the general line of the Northern Pacific Railroad Company, as adopted by the board of directors of that railroad company is delineated; also a copy of the letter of the president of said company dated the 6th instant, requesting that the granted lands along said line be withdrawn from the market in view of the provisions of the 3rd and 6th sections of the act of Congress approved July 2nd, 1864 (Pamphlet Laws, pages 368, 369). Should you perceive no objection I think that the odd-numbered sections along the line for ten miles in width on each side in Minnesota and Wisconsin; and for twenty miles in width on each side along that part of the line extending through the Territories westward to Puget sound may be withdrawn as requested as preliminary to the final survey and location of said railroad. The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of the act of Congress.

Very respectfully your obedient servant,

J. P. USHER, *Secretary.*

Commissioner of the General Land Office.

(Here follows diagram marked p. 67*a*.)

68 EXHIBIT "D" TO ANSWER.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June* 22, 1865.

SIR: The late Secretary of the Interior, under date of the 9th of March last, enclosed to this office a diagram showing the proposed route of the Northern Pacific railroad, for which a grant of lands was made by the act approved July 2, 1864 (Stats. at Large, Pamphlet Laws 1864, page 365).

This diagram was filed in the Secretary's office, accompanied by a request for withdrawal of lands.

As no withdrawal was ordered by the late Secretary, no action was here taken upon the application.

Mr. Perham, the president of the railroad company, has called attention to the matter, and in submitting it I have the honor to state: 1. That the present application deals with the railroad system of granting on the largest scale known to congressional legislation. It extends from Lake Superior to the Pacific ocean, and allowing for probable deflections may be set down at 2,025 miles in length, taking in alternate sections by estimate 47,360,000 acres in a belt of 40 miles wide through the Territories, and 20 miles wide through the States, the general or conjectural course being indicated on the map herewith.

By the opinions of Attorney General Cushing, of December 19th, 1856, and February 16th, 1857 (Opinions of Attorney Gen-
69 eral, vol. VIII, pages 244 and 290), and the action of the department, railroad grants take effect from the date when the survey of the route is actually made on the face of the earth.

The evidence required of the route under the established ruling of the department is a connected map showing the exact location, the map indicating by flag-staffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee. That proof is required to show the precise portions of each section or smallest legal subdivisions cut by the route.

In the judgment of the Commissioner no withdrawal should be ordered until such map is filed in the General Land Office; and although in the Attorney General's opinion—Mr. Cushing—the right takes hold from the date of actual survey on the ground, yet upon that point this office, with deference to superior legal authority, holds that the grant does not become effective until the map is actually filed in the district land office, where citizens resort to ascertain what is public land and what is not, so that purchases can be made without danger of conflicting title. Yet, even admitting that the right in the railroad grant attaches from the date of such surveys, we are without the means of ascertaining and determining the interests of rightful claimants until such map is filed.

Now in this view the Commissioner reports that no with-
70 drawal should be ordered until the map of actual survey, authenicated as indicated, shall be filed in the district and General Land Offices.

This may be done, starting from the cul-de-sac of Lake Superior, the eastern initial point of the route, and stretching thence westwardly to the western boundary of Minnesota, the line of the public survey having been that far established.

2. The same course of proceeding to be had in regard to that portion of the road falling on the western or Pacific side within the range of existing public surveys, but,

3. Of course no withdrawal can now be made on account of the road in the region of country extending across that part of the country between the west boundary of Minnesota to the eastern surveys of Washington Territory, because over that Territory the lines of the public surveys have not yet been established. In this extended locality the withdrawal should only be ordered as the public surveys are advanced, and survey of railroad established in like manner as indicated under first head.

4. A general withdrawal upon conjectural or uncertain basis might result from shutting out from settlement large bodies of land which an actual survey would show not within the grant, whilst lands would be omitted from the withdrawal which the survey might require to be included.

Then it is not sound policy, nor is there any warrant in
71 our land legislation for doing any act, the tendency of which would give preference to satisfying a grant on such a stupendous scale as this whilst individual claims under our general system of land laws, homestead pre-emption and sale would be unaided by any such preliminary discriminating proceeding.

The result of a premature withdrawal on uncertain basis would be unjust to the pioneer settler, detrimental to the public interests in arresting the progress of settlement and disposal in that direction of the public domain, and to that extent checking the growth and prosperity of our frontier, and that too, in the vicinity of a colonial dependence of a powerful nation, would be a prejudice to the interests of the railroad grant itself in excluding settlers and immigrants whose labor and means would enhance the value of such lands as in the ordinary progressive operations of the land system would in due time fall to the grant. The land system should be so administered that all different acts of land legislation may be at the same time in full operation, giving precedence to no law over another unless where the terms of law indicate the public will to be otherwise, leaving corporate or other grantees and individuals respectively to have the benefit of their superior diligence in establishing and completing their several claims according to law.

For these considerations this office declines ordering a withdrawal until authenticated maps of the actual survey of the several portions of the route shall be successively filed from time to time to completion, showing the connections of said portions with the lines
72 of the public surveys, yet respectfully submits the foregoing

considerations for such directions as the Secretary may be pleased to give in the premises for the government of this office.

With great respect, your obedient servant,

JOS. J. WILSON,
*Acting Commissioner.*

Hon. Jas. Harlan, Secretary of the Interior.

STATE OF OREGON, }
*County of* ——, } *ss:*

I, John D. Wilcox, being first duly sworn, say on oath that I am the defendant in the above-entitled suit and that the matters therein stated are true of my own knowledge except as to those matters stated on information and belief, and as to such matters I believe the same to be true.

J. D. WILCOX.

Subscribed and sworn to before me this 29th day of August, 1896.
[SEAL.] J. L. STORY,
*Notary Public for Oregon.*

DISTRICT OF OREGON, *ss:*

Due service of the within answer is hereby accepted in the district of Oregon, at Portland, this 4th day of September, 1896, by receiving a copy thereof, duly certified to as such by Geo. A. Brodie, one of the solicitors for defendant, except as to Exhibit "B," a copy of which is waived.

DOLPH, NIXON & DOLPH,
*Solicitors for Complainant.*

(Endorsed:) Filed September 4, 1896. J. A. Sladen, clerk.

And afterwards, to wit, on Monday, the 7th day of September, 1896, the same being the 127th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant,
*vs.*
JOHN D. WILCOX, Defendant. } No. 2325.

*Order.*

Now at this day comes the complainant, by J. N. Dolph, of counsel, the defendant appearing by John M. Gearin, of counsel, and on motion of complainant, the defendant by his said counsel consenting thereto,

It is ordered that the above-entitled suit be, and the same is, set

down for hearing upon bill and answer and that it be heard on September 11th, 1896, at eleven o'clock a. m.

Dated September 7, 1896.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed September 7, 1896. J. A. Sladen, clerk.

And afterwards, to wit, on Friday, the 11th day of September, 1896, the same being the 131st judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger United States district judge presiding—the following proceedings were had in said case, to wit:

75 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY
*vs.*
JOHN D. WILCOX. } No. 2325.

*Order.*

SEPTEMBER 11, 1896.

Now, at this day, comes the plaintiff herein, by Mr. J. N. Dolph, of counsel, and moves the court for a continuance of this cause, heretofore set for Friday, September 11, 1896, whereupon it is ordered that the final hearing of this cause be, and it is hereby, continued to Tuesday, September 15, 1896.

And afterwards, to wit, on Tuesday, the 15th day of September, 1896, the same being the 134th judicial day of the regular April term of said court—present, the Honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said case, to wit:

76 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY
*vs.*
JOHN D. WILCOX. } No. 2325.

*Order.*

SEPTEMBER 15, 1896.

Now, at this day, comes the plaintiff, by Mr. J. N. Dolph, of counsel, and the defendant, by Mr. John M. Gearin, of counsel, and thereupon this cause comes on to be heard upon the bill and answer herein, and the court having heard the arguments of counsel will advise thereof.

And afterwards, to wit, on Tuesday, the 5th day of January, 1897, the same being the 79th judicial day of the regular October term of said court—present, the Honorable William B. Gilbert, United States circuit judge presiding—the following proceedings were had in said case, to wit:

77 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant,
*vs.*
JOHN D. WILCOX, Defendant.

*Decree Dismissing Bill of Complaint.*

This cause having been heard and submitted to the court on the 15th day of September, 1896, upon bill and answer, and the court having taken the same under advisement, and now due deliberation having been had, it is ordered, adjudged, and decreed that the said bill of complaint herein be, and the same is hereby, dismissed, with costs to the complainant to be taxed.

Dated January 5th, 1897.

WM. B. GILBERT, *Judge.*

(Endorsed:) Filed January 5, 1897. J. A. Sladen, clerk.

78 And afterwards, to wit, on the 5th day of January, 1897, there was duly filed in said court, petition for appeal and an assignment of errors, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE EASTERN OREGON LAND COMPANY, Complainant,
*vs.*
JOHN D. WILCOX, Defendant.

*Petition for Appeal.*

The above-named complainant, The Eastern Oregon Land Company, conceiving itself aggrieved by the decree made and entered on the 5th day of January, 1897, in the above-entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the ninth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the
79 record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

Dated Jan. 5th, 1897.

DOLPH, NIXON & DOLPH,
*Solicitors for Complainant.*

The foregoing claim of appeal is allowed.

Dated January 5th, 1897.

WM. B. GILBERT,
*Circuit Judge.*

I hereby this 5th day of January, 1897, accept due and personal service of the foregoing petition on appeal on behalf of John D. Wilcox, defendant.

JNO. M. GEARIN,
*Solicitor for Defendant and Appellee.*

80 In the Circuit Court of the United States for the District of Oregon. In Equity.

THE EASTERN OREGON LAND COMPANY, Complainant,
*vs.*
JOHN D. WILCOX, Defendant.

*Assignment of Errors.*

And now on the 5th day of January, 1897, came the complainant, by Dolph, Nixon & Dolph, its solicitors, and says that the decree in the above-entitled cause is erroneous and against the just rights of the complainant, for the following reasons:

First. Because it appears by the bill and answer in said suit that a decree should have been rendered and given therein by said court in favor of the complainant as prayed for in the bill of complaint, to wit:

That the patent for the lands in controversy issued by the United States to the defendant described in the bill of complaint was fraudulent and void as against the complainant, and that the same
81 be canceled and annulled; that complainant was the owner in fee-simple of the lands described in said patent and was entitled to the immediate possession thereof and to have the process of the court to be put in possession thereof, and that the defendant was trustee for the complainant of whatever title was conveyed to him under said patent and that he convey the same to the complainant.

Second. Because it appeared by the bill and answer that the defendant was not entitled to a decree and the court erred in rendering a decree for the defendant dismissing the complainant's bill.

Third. Because it appeared by the bill and answer in said suit that the land in controversy was granted to the State of Oregon by an *an* act of Congress entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles city on the Columbia river to Fort Boise on the Snake river," approved February 25, 1867, and had been granted by the State of Oregon to the Dalles Military Wagon Road Company by act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, and that all the conditions of said grant had been complied with by said company, the definite location and construction and completion of said road had been duly certified to by the governor of Oregon on the 23rd day of June, 1869, and on said date the said land had been withdrawn from settlement and sale, and the title of the said wagon road company had become absolute before the passage

of the joint resolution of May 31st, 1870, authorizing the
82 Northern Pacific Railroad Company to locate the main line
of its road via the valley of the Columbia river and that complainant had succeeded to the title of said company.

Fourth. Because the court erred in holding and deciding that the grant of lands made to the State of Oregon by the said act of Congress of February 25, 1867, did not come within the exceptions to the grant of land made to the Northern Pacific Railroad Company by the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," approved July 2, 1864, and the joint resolution of Congress entitled "A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes," approved May 31, 1870.

Fifth. Because the court erred in holding and deciding that the land in controversy *and* granted to the Northern Pacific Railroad Company by said act of July 2, 1864, or the said joint resolution of May 31, 1870.

Sixth. Because the court erred in holding and deciding that it appeared from the bill and answer that the land in controversy was or ever had been a portion of the said grant to the Northern Pacific Railroad Company.

Seventh. Because the court erred in holding and deciding that the grant of lands to the said Northern Pacific Railroad Company between Wallula, Washington, and Portland, Oregon, were ever
83 located or fixed so as to attach to any particular parcel of
land or to show that the lands in controversy were a part of said grant.

Eighth. Because the court erred in holding and deciding that the lands in controversy were excepted from the grant to the State of Oregon made to it by the said act of Congress approved February 25, 1867.

Ninth. Because the court erred in holding and deciding that the supposed grant to the Northern Pacific Railroad Company for its road from Wallula to Portland was ever located or fixed or that said company ever acquired any right or title to the lands in controversy so as to segregate them from the public domain or to prevent the said grant to the State of Oregon from attaching thereto.

Tenth. Because the court erred in holding that the map referred to in the answer and known as the Perham map was valid or in any manner located the line of the road of the Northern Pacific Railroad Company or located or defined its supposed land grant or reserved or withdrew any lands from the operation of the said grant to the State of Oregon.

Eleventh. Because the court erred in holding that on account of said grant to the Northern Pacific Railroad Company made by said act of July 2, 1864, or the said joint resolution of Congress of May 31, 1870, or the transmission by said company of the said Perham map to the Secretary of the Interior or the filing of said map of

August 13th, 1870, of its general route of its road by said
84 Northern Pacific Railroad Company from Wallula to Portland or any other matter or proceeding the land in controversy was excepted from the operation of said grant to the State of Oregon.

Twelfth. Because the court erred in holding and deciding that the land in controversy was forfeited to the United States by the act of Congress forfeiting grants and had been restored to the public domain and was open to settlement or subject to sale by the United States at the time of the defendant's alleged purchase of the same.

Thirteenth. Because the court erred in not holding that said defendant had obtained and held the legal title to the land in controversy as trustee for the complainant.

Wherefore the said complainant prays that the said decree be reversed and that the said court be directed to enter a decree in accordance with the prayer of the bill.

DOLPH, NIXON & DOLPH.
*Solicitors for Complainant.*

I hereby this 5th day of January, 1897, accept due and personal service of the foregoing assignment of error on behalf of John D. Wilcox, defendant.

JNO. M. GEARIN,
*Solicitor for Appellee.*

(Endorsed:) Filed January 5, 1897. J. A. Sladen, clerk.

And afterwards, to wit, on the 5th day of January, 1897, there was duly filed in said court, bond for costs on appeal, in words and figures as follows, to wit:

85 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant,
*vs.*
JOHN D. WILCOX, Defendant.

*Bond for Costs on Appeal.*

Know all men by these presents that we, The Eastern Oregon Land Company, are held and firmly bound unto John D. Wilcox, the above-named defendant, in the sum of two hundred and fifty dollars, to be paid to the said John D. Wilcox, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 5th day of Jan., 1897.

Whereas the above-named Eastern Oregon Land Company has

appealed to the United States circuit court of appeals for the
86 ninth circuit, to reverse the decree in the above-entitled cause by the circuit court of the United States for the district of Oregon.

Now, therefore, the condition of this obligation is such that if the above-named, The Eastern Oregon Land Company shall prosecute said appeal to effect, and answer all costs if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE EASTERN OREGON LAND COMPANY,
(S'g'd) By DOLPH, NIXON & DOLPH,
*Its Attorneys.* [L. S.]
(S'g'd) CHARLES STERN. [L. S.]
(S'g'd) JOHN O'CONNOR. [L. S.]

Signed, sealed, and delivered in the presence of—
—— ——.

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I, Charles Stern, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district, and that I am worth, in property situated therein, the sum of five hundred dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

(S'g'd) CHARLES STERN.

Subscribed and sworn to before me this 5th day of January, 1897.

[SEAL.] RICHARD NIXON,
*Notary Public for Oregon.*

87 UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I, John O'Connor, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district, and that I am worth, in property situated therein, the sum of five hundred dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

(S'g'd) JOHN O'CONNOR.

Subscribed and sworn to before me this 5th day of January, 1897.

[SEAL.] RICHARD NIXON,
*Notary Public for Oregon.*

The foregoing bond is approved Jan. 5, 1897.

(S'g'd) WM. B. GILBERT, *Judge.*

(Endorsed:) Filed January 5, 1897. J. A. Sladen, clerk.

And afterwards, to wit, on the 5th day of January, 1897, there was duly filed in said court a stipulation and order to send original Exhibit "B" to answer with transcript, in words and figures as follows, to wit:

88 In the Circuit Court of the United States for the District of Oregon.

EASTERN OREGON LAND COMPANY, Complainant,
*vs.*
JOHN D. WILCOX, Defendant.

*Stipulation and Order.*

It is hereby stipulated between the parties to the above-entitled suit, by their respective attorneys, that the map commonly known as the Perham map, attached to the answer of the defendant herein, may be withdrawn from the files and made part of the record to be sent to the United States circuit court of appeals for the ninth circuit, the court consenting thereto.

DOLPH, NIXON & DOLPH,
*Solicitors for Complainant.*
JNO. M. GEARIN,
*Solicitor for Defendant.*

89 Based upon the foregoing stipulation, it is ordered that the original map referred to be withdrawn from the files of the court and made a part of the record on appeal in the above-entitled suit.

WM. B. GILBERT, *Judge.*

(Endorsed:) Filed January 5, 1897. J. A. Sladen, clerk.

*Clerk's Certificate to Transcript.*

DISTRICT OF OREGON, *ss:*

I, J. A. Sladen, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing transcript of record on appeal to the United States circuit court of appeals for the ninth circuit, in cause No. 2325, The Eastern Oregon Land Company *vs.* John D. Wilcox, is a full, true, and correct transcript of the record in said cause as the same appears at my office and in my custody.

I further certify that the cost of the foregoing transcript is thirty-four and $\frac{20}{100}$ dollars, and that the same has been paid by the appellant, The Eastern Oregon Land Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at Portland in said district, this 7th day of January, A. D. 1897.

[SEAL.] J. A. SLADEN,
*Clerk United States Circuit Court, District of Oregon.*

90 (Endorsed:) No. 348. In the United States circuit court of appeals for the ninth circuit. The Eastern Oregon Land Company, appellant, *vs.* John D. Wilcox. Transcript of record. Appeal from the circuit court of the United States for the district of Oregon.

Filed Jan. 9, 1897. F. D. Monckton, clerk.

91 United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY, Appellant,
*v.*
JOHN D. WILCOX, Appellee. } No. 348.

THE EASTERN OREGON LAND COMPANY, Appellant,
*v.*
E. I. MESSINGER, Appellee. } No. 349.

Appeal from the circuit court of the United States for the district of Oregon.

Dolph, Nixon & Dolph, for appellant; John M. Gearin and J. L. Story, for appellees.

Before Ross, circuit judge, and Hawley and Morrow, district judges.

HAWLEY, *District Judge:*

Both of these cases present the identical questions that were involved in the case of The Oregon & California Railroad Company *v.* United States, 74 Fed., 67, and are necessarily controlled by the decision in that case. We adhere to the views therein expressed, and upon the authority of that case the judgments and decrees in these cases are reversed, with instructions to the circuit court to enter a decree in favor of the complainant in each case.

(Endorsed:) Opinion. Filed Feb. 23, 1897. F. D. Monckton, clerk.

92 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1896.

THE EASTERN OREGON LAND COMPANY, Appellant,
*v.*
JOHN D. WILCOX. } No. 348.

Appeal from the circuit court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Oregon, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, with instructions to the circuit court to enter a decree in favor of the complainant.

(Endorsed:) Decree. Filed Feb. 23, 1897. F. D. Monckton, clerk.

93 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY, Appellee,
*vs.*
JOHN D. WILCOX, Appellant.

The above-named appellant, John D. Wilcox, conceiving himself aggrieved by the order and decree entered on February 23, 1897, in the above-entitled cause, doth hereby appeal from said order and decree to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

GEARIN, SILVERSTONE & BRODIE,
*Attorneys & Solicitors for Appellant.*

Portland, Oregon, Aug. 3d, 1897.

And now, to wit, on 3d day of August, 1897, it is ordered that the appeal be allowed as prayed for.

WM. B. GILBERT,
*Judge of the U. S. Circuit Court of Appeals for the Ninth Circuit.*

Due service of the foregoing notice of appeal and allowance is hereby admitted made on us in Multnomah county, Oregon, August 7th, 1897.

DOLPH, NIXON & DOLPH,
*Att'ys for Appellee.*

(Endorsed:) Appeal and allowance. Filed Aug. 11, 1897. F. D. Monckton, clerk.

94 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY, Appellee,
*vs.*
JOHN D. WILCOX, Appellant.

Know all men by these presents that we, John D. Wilcox and C. E. Brown, of the county of Sherman, State of Oregon, are held and firmly bound unto the above-named The Eastern Oregon Land Company in the sum of two hundred and fifty dollars, to be paid to the said The Eastern Oregon Land Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of Aug., 1897.

Whereas the above-named John D. Wilcox has prosecuted an appeal to the Supreme Court of the United States to reverse the

decree rendered in the above-entitled suit by the judges of the United States circuit court of appeals for the ninth circuit:

Now, therefore, the condition of this obligation is such that if the above-named John D. Wilcox shall prosecute said appeal to effect and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

J. D. WILCOX.
C. E. BROWN.

95 STATE OF OREGON, } ss:
*County of Sherman,* }

This certifies that on this seventh day of August, 1897, before me, the undersigned, a notary public in and for said county and State, personally appeared the within-named John D. Wilcox and C. E. Brown, personally known to me to be the identical parties whose names are signed to the foregoing instrument of writing, and they and each of them acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and
[SEAL.] notarial seal this the day and year in this certificate above written.

CHARLES W. MOORE,
*Notary Public for Oregon.*

(Endorsed:) Bond on appeal. Filed Aug. 11, 1897. F. D. Monckton, clerk.

96 United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY, Appellant,
*vs.*
JOHN D. WILCOX, Appellee. } No. 348.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing ninety-five (95) pages, numbered from one (1) to ninety-five (95), both inclusive, to be a true copy of the record and of all proceedings in the above-entitled cause, including opinion filed, as the same appear of record in said circuit court of appeals, and that the same constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 17th day of August, A. D. 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

97 UNITED STATES OF AMERICA, ss:

To the Eastern Oregon Land Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington,

on the second Monday in October, 1897, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Eastern Oregon Land Company is appellee and John D. Wilcox is appellant, to show cause, if any notice of appeal there be, why the judgment and decree in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3rd day of August, 1897.

WM. B. GILBERT,
*Judge U. S. Circuit Court of Appeals for Ninth Circuit.*

98 Due service of the foregoing citation is admitted made on use in Multnomah county, Oregon, this 7th day of August, 1897.

DOLPH, NIXON & DOLPH,
*Att'ys for the Eastern Oregon Land Company.*

99 [Endorsed:] D. No. 348. In U. S. circuit court of appeals, ninth circuit. The Eastern Oregon Land Company, appellee, *vs.* John D. Wilcox, appellant. Citation. Filed Aug. 11, 1897. F. D. Monckton, clerk.

100 In the Supreme Court of the United States.

THE EASTERN OREGON LAND COMPANY, Appellee,
*vs.*
E. I. MESSENGER, Appellant.

THE EASTERN OREGON LAND COMPANY, Appellee,
*vs.*
JOHN D. WILCOX, Appellant.

*Stipulation as to Printing Record.*

The bills, answers, decrees, assignments of error, and all other papers and proceedings in the above-entitled causes being exactly alike, with the exception that in the case of The Eastern Oregon Land Company *vs.* E. I Messinger it is alleged that the land patented to the defendant was patented under the provisions of the act of Congress approved May 20th, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto; that the lands patented were the south half of the northwest quarter and lots three and four of section three, township two south, of range sixteen east, of the Willamette meridian, in Oregon, and were situated within twenty miles of the line of the general route of the Northern Pacific Railroad Company's road as designated on the map of August 17, 1870, and that the said patent was dated the 17th day of August, 1894, while in the case of The Eastern Oregon Land Company *vs.* John D. Wilcox it

is alleged that the land patented to him was patented under
101 the provisions of the act of Congress approved April 24, 1820, entitled "An act making further provisions for the sale of public lands," and the acts supplemental thereto; that the lands patented were the northeast quarter and the southeast quarter of section fifteen, township five south, of range seventeen east, of the Willamette meridian, in Oregon, and were situated more than twenty miles and less than forty miles from the line of the general route of the Northern Pacific Railroad Company's road, and that said patent was dated the 28th day of December, 1894—

It is stipulated by the parties to the above-entitled suits, by their respective attorneys, that, unless the above-entitled court shall otherwise order, only the record in the above-entitled suit of The Eastern Oregon Land Company *vs.* John D. Wilcox shall be printed, and that the appeal in the case of The Eastern Oregon Land Company *vs.* E. I. Messinger may be heard and submitted in said court without printing the record thereof.

JAMES K. KELLY,
*Solicitors for Appellees.*
JNO. M. GEARIN,
*Solicitors for Appellants.*

102 [Endorsed:] In the Supreme Court of the United States. E. I. Messinger, appellant, *vs.* The Eastern Oregon Land Company, appellee, and John D. Wilcox, appellant, *vs.* The Eastern Oregon Land Company, appellee. Stipulation as to printing record.

103 [Endorsed:] Case No. 16,667. Supreme Court U. S., October term, 1897. Term No., 454. John D. Wilcox, app't, *vs.* The Eastern Oregon Land Co. Stipulation as to printing record. Office Supreme Court U. S. Filed Sep. 15, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,667. U. S. circuit court of appeals, 9th circuit. Term No., 454. John D. Wilcox, appellant, *vs.* The Eastern Oregon Land Company. Filed September 15, 1897.

# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

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JOHN D. WILCOX, APPELLANT,
*v.*
THE EASTERN OREGON LAND COMPANY, appellee,
No. 454.

and

E. I. MESSINGER, APPELLANT,
*v.*
THE EASTERN OREGON LAND COMPANY, appellee.
No. 455.

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**SUGGESTION BY THE SOLICITOR-GENERAL THAT THE CONSIDERATION OF THESE CASES BE DEFERRED UNTIL CASE NO. 295, THE UNITED STATES v. THE OREGON AND CALIFORNIA RAILROAD COMPANY, SHALL BE SUBMITTED ON ARGUMENT, AND THE THREE CASES BE CONSIDERED BY THE COURT TOGETHER.**

The two cases above named are submitted under rule 20.

The suggestion made, on behalf of the United States, is because of this condition: The three cases are appeals from decrees of the Circuit Court of Appeals for the Ninth Circuit, and the principal controlling question is the same in all three cases.

In Nos. 454 and 455 appellees claim the lands involved by virtue of the act of Congress of February 25, 1867 (14 Stats., 409), making a grant of public lands to the State of Oregon in aid of the construction of a wagon road in that State. Performance under the act, by due construction of the road and its acceptance by the governor of Oregon is admitted, and by due conveyance the appellees took the title to the lands in dispute, if they were public lands on February 25, 1867.

These lands lie north of Portland.

The lands in No. 295 lie south of Portland, and are claimed by appellees under the grant made by act of Congress of July 15, 1866 (14 Stats., 239), in aid of a railroad from Portland south to the State boundary line of Oregon.

Due construction and acceptance of this line of railroad by the proper executive officers of the Government is conceded, and appellee and its assigns have complete title to these lands if they were public lands July 15, 1866.

The Northern Pacific Railroad act was approved July 2, 1864.

A certain map, known as the "Perham map," of a projected line of railroad of the Northern Pacific Company was filed in the Interior Department March 6, 1865, but was rejected by the Department. No action was ever taken as to it after this rejection.

On August 4, 1870, a map of "general route" of the Northern Pacific Railroad line between Wallula and Portland was filed and approved, but before this the Oregon and California Railroad had been constructed

and accepted, and also The Dalles Military Road had been constructed and accepted by the governor of Oregon.

The lands in all three cases lie within 40 miles of the line of the map of general route of the Northern Pacific Railroad of August, 1870.

No map of "definite location" of line of the Northern Pacific Railroad was ever filed, nor any road constructed between Wallula and Portland, opposite the lands in question, and the contention of appellees is, as was held below, that, therefore, no right in the Northern Pacific Railroad Company ever attached to any of these lands. That contention growing out of the question as to the legal effect of the Perham map and the map of August, 1870, as to these lands, is the fundamental question common to all three cases.

The Circuit Court of Appeals in deciding the cases of Wilcox and Messinger disposed of them in these words: "Both these cases present the identical questions that were involved in the case of The Oregon and California Railroad Company *vs.* The United States, and are *necessarily controlled by the decision in that case.*"

The italics are mine.

*Again:* The brief filed by counsel for appellants here in Nos. 454 and 455 is by Mr. John M. Gearin, who was special counsel for the United States in No. 295 in the court below, and is the same in substance on the main question as was filed in No. 295 below.

*Again:* The argument for appellees here in Nos. 454 and 455 is substantially the same as the argument in No.

295 for defendants below; indeed, a substantial portion of the brief for appellee in No. 295 below is copied into and made part of the brief for appellee in Nos. 454 and 455.

As conceded by Judge Kelly, orally, before the Court on the 15th instant, the United States has a direct and deep interest in Nos. 454 and 455.

As he said, there are over 70,000 acres of land within the conflicting limits of the wagon-road grant which will be affected by the decision of the two cases named.

Nearly 200,000 acres are involved in the controversy in No. 295; and I confidently submit that the Court should have the benefit of the full argument, in all phases, in *all* the cases before *determining* the one happening to be first formally submitted under the rule, upon printed briefs only, and therefore that an order be made that consideration of Nos. 454 and 455 will be deferred until No. 295 shall be reached and submitted.

Opposing counsel in No. 295 concur in this motion.

JOHN K. RICHARDS,
*Solicitor-General.*